89-1622

No. _____

IN THE

Supreme Court of the United States

October Term, 1989

ODEH JOSEPH SALEH,
Petitioner,

vs.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR WRIT OF CERTIORARI
To the United States Court of Appeals
For the Sixth Circuit

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QUESTIONS PRESENTED

1. Was it plain error for the trial court to a) refuse to instruct the jury on the elements of constructive possession of a firearm under 21 U.S.C. 922(g); b) fail to instruct the jury that the fact that a firearm was legally owned by another person and thus legally on the premises could be considered in determining constructive possession; and c) instruct the jury that possession of the firearm for "any length of time" was sufficient to convict without limiting this to the date charged in the indictment?

2. Is evidence of co-ownership by the petitioner of a grocery store in which a firearm is legally on the premises, being legally registered and owned by another co-owner of the store, and petitioner's mere presence in the store and proximity to the firearm sufficient to establish constructive possession of that firearm for purposes of conviction under 21 U.S.C. 922(g)?

3. Is evidence of a conspiracy to commit a crime also evidence of aiding and abetting a subsequent crime two weeks after abandonment of the original scheme?

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IN THE

Supreme Court of the United States

October Term, 1989

ODEH JOSEPH SALEH,
Petitioner,

vs.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR WRIT OF CERTIORARI
To the United States Court of Appeals
For the Sixth Circuit

The Petitioner, Odeh Joseph Saleh, respectfully prays that a Writ of Certiorari issue to review the Judgment on summary disposition of the Court of Appeals for the Sixth Circuit entered in this case on January 17, 1990.

OPINIONS BELOW

The Judgment on summary disposition of the Court of Appeals for the Sixth Circuit appears in the Appendix, as does the Judgment of the United States District Court for Eastern District of Michigan, Southern Division.

JURISDICTION

The Judgment of the Court of Appeals for the Sixth Circuit was entered on January 17, 1990. The Petitioner did not seek rehearing. This Petition for Writ of Certiorari has been filed within 90 days of the January 17, 1990 Judgment. This Court has jurisdiction to grant this Petition under 28 U.S.C. Sec. 1254(1).

CONSTITUTIONAL PROVISION INVOLVED

The constitutional issue in this case arises under the Due Process Clause, Fifth Amendment, of the United States Constitution: "No person shall be . . . deprived of life, liberty, or property, without due process of law."

STATEMENT OF THE CASE

Petitioner Odeh Joseph Saleh ("Joe") worked at a grocery store co-owned by himself, his brother Ahmed Joseph Saleh ("Tony"), and a third person named Robert Damon. The store was in a rough neighborhood of Southwest Detroit. Tony Saleh worked in the store during the week. Joe Saleh worked in the store on Fridays.

Tony Saleh legally owned a registered pistol which was sometimes kept at the store under the counter by the cash register.

On Friday, December 4, 1989, Joe Saleh was assisting a female customer with her purchase of groceries. Suddenly, federal agents burst into the store, seized Joe Saleh and put him on the floor, handcuffed him, searched the store pursuant to a warrant, and found a pistol registered to his brother Tony Saleh under the counter by the cash register. At no time on the date charged did Joe Saleh touch or even make a move toward the pistol, or in any other way attempt to control it.

During the search of the store, the federal agents found 50 grams of cocaine on top of a cooler in a public area of the store over fifteen feet away. Immediately prior to the raid on the store, federal agents had also arrested Tony Saleh and another individual, Joe Slate for attempting to sell 500 grams of cocaine at a location across town. No testimony or evidence was offered directly linking Petitioner to the attempted sale of the 500 grams.

The charges against Joe Saleh included "felon in posession of a firearm" under 21 U.S.C. 922(g), possession of 50 grams of cocaine on or about December

4, 1989, under 21 U.S.C. Section 841(a)(1), and aiding and abetting an attempted distribution of cocaine on or about December 4, 1989 under 21 U.S.C. 841(a)(1) and 846, and 21 U.S.C. Section 2.

The case was set for trial beginning January 3, 1989. The case was heard and the jury returned verdicts of guilty on all counts. Joe Saleh timely appealed to the Sixth Circuit Court of Appeals, alleging three assignments of error. The Court of Appeals affirmed the appeal on summary disposition on January 17, 1990. This Petition for Writ of Certiorari was timely filed on April 17, 1990.

REASONS FOR GRANTING THE WRIT

First Question Presented:

The plain error rule, Fed. R. Crim. P. 52(b), states that "plain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the court." Defense counsel raised objections to the jury instructions on the charge of gun possession under 21 U.S.C. 922(g) at trial; however, these issues were not raised on direct appeal to the Court of Appeals. It is Petitioner's prayer to this honorable Court, however, that it exercise its power to notice plain error even where it has not been previously raised, *United Brotherhood, C.J. v. United States,* 330 U.S. 395, in order that the Court may rectify an instance of manifest injustice. The errors in the trial court's jury instructions on this charge affected a substantial right of the Petitioner; namely, the constitutional due process right to be convicted only upon proof beyond a reasonable doubt of each and every element of the charge. *Rose v. Clark,* 478 U.S. 570 (1986).

The jury instructions given by the trial court on the charge under 21 U.S.C. 922(g) were inherently prejudicial on several grounds. The trial court gave instructions regarding constructive possession on the counts of cocaine possession, both before and after giving the instructions on the firearm possession charge. Yet, the trial court denied defense counsel's request that the court instruct the jury on the elements that needed to be established for the jury to find that Petitioner had constructive possession of the firearm. Specifically, the court should have instructed the jury that "Constructive possession exists when a person does not have actual possession but instead knowingly has the power and the

intention at a given time to exercise dominion and control over an object, either directly or through others," *United States v. Beverly*, 750 F.2d 34, 37 (6th Cir. 1984).

Given the fact that there was no evidence whatsoever that Petitioner was ever in actual possession of the firearm "on or about December 4, 1987", the failure of the trial court to instruct the jury that they were required to find that Petitioner knowingly had the power and the present intention to control the firearm clearly prejudiced the Petitioner by allowing the jury to find constructive possession on lesser proof than is constitutionally required. In effect, it allowed the jury to find constructive possession on the mere facts of Petitioner's co-ownership of the premises and proximity to the firearm, without finding the key elements of knowledge of the firearm's presence and the present intent to exercise control over the firearm.

As there was insufficient evidence presented to support a finding beyond a reasonable doubt of either of these elements, as discussed more fully under the second question presented for review, the trial court's failure to instruct the jury as to these elements was clearly prejudicial and resulted in a verdict that otherwise would have been different.

Next, the trial court failed to adequately instruct the jury on the probative value of the fact that the firearm in question was legally registered and owned by Petitioner's brother. The trial court properly instructed the jury that ownership was not an element of the charge and thus not part of the government's burden of proof, and then stated that ownership by another person "was not a defense in this case". However, the trial court failed to go on to say that the fact of ownership could be weighed in determining whether Petitioner was in

constructive possession of the weapon. By so emphatically denying the Petitioner the use of the fact of ownership by another in his defense in any manner, the trial court effectively precluded the jury from considering ownership as a relevant factor whatsoever.

Petitioner contends that actual ownership—particularly under the facts of this case—is a factor that must be weighed by the jury in determining a defendant's constructive possession. The trial court must at least acknowledge that such evidence may have probative weight, and such evidence must not be summarily dismissed from the jury's consideration, as was the case here.

In cases where evidence was offered of the true ownership of the weapon, that factor was properly weighed in determining the defendant's constructive possession. See *United States v. Wilson*, 620 F. Supp. 104 (D.C. Tenn), *affirmed* 774 F.2d 1164; *United States v. McCoy*, 781 F.2d 168 (10th Cir. 1985); *United States v. Tribunella*, 749 F.2d 104 (1984). Indeed, in *Tribunella*, *supra*, the fact that the *Defendant* owned guns was a significant factor in establishing his constructive possession.

Had the facts in this case been slightly different—if it had been the Petitioner who was the registered owner of the gun—the government would certainly have presented this as strong circumstantial evidence of Petitioner's constructive possession, and the trial court's instructions would undoubtedly have included an appropriate comment about the probative value of such fact. It is fundamentally unfair and prejudicial to preclude the jury from weighing uncontroverted evidence of the actual ownership of a gun when that evidence can create reasonable doubt as to a defendant's constructive possession.

The fact that Petitioner's brother, who was a co-owner of the store and who worked there almost daily, was the legal owner of the firearm, if properly weighed along with other facts—such as the fact that Petitioner worked there only one day per week, that he was busy helping a customer at the time of his arrest, and that there was no direct evidence of either Petitioner's knowledge of the presence of the firearm or of any intent to exercise control over it—would have established the reasonable doubt that would have resulted in acquittal on this charge.

Finally, the trial court's failure to instruct the jury on the elements of the knowledge and intent necessary for constructive possession, and its preclusion of consideration by the jury of the factor of actual ownership, effectively limited the jury to finding *actual* possession in order to find Petitioner guilty of the charge. There was no evidence produced of actual possession of the firearm by the Petitioner on or about December 4, 1987, as charged in the indictment, nor did the government even attempt to argue that there was.

Had the court properly instructed the jury that, in order to find actual possession, they needed to find that Petitioner was in knowing, physical control of the weapon *on or about December 4, 1987,* the verdict would clearly have been Not Guilty on this charge. However, the court's instruction that it was sufficient for a finding of guilt if the Petitioner possessed the firearm for "any length of time"—without clearly limiting the time period to the date specified in the indictment—allowed the jury to convict Petitioner based upon testimony that, at some unspecified time—possibly several years—in the past, he was observed handling an unidentified gun. The time of

this occurrence was never established, nor was the gun that was allegedly handled in the past established to be the firearm found on December 4, 1987.

Obviously, Petitioner could not have been found guilty of violating 21 U.S.C. 922(g) if he had possessed a firearm in commerce before he was under disability by virtue of a felony conviction. Even assuming *arguendo*, that it had been conclusively established that he had handled a gun while under disability at some time in the past, this fact would not sufficiently establish, nor does it even allow a reasonable inference, that he was in actual possession of the firearm found on the specific date alleged in the indictment. Yet, the trial court's open-ended charge on this issue left the jury free to improperly draw this very conclusion.

Therefore, Petitioner prays that this Court may accept his Petition for Writ of Certiorari in order to find plain error and to rectify a manifest injustice.

Second Question Presented:

The petition for writ of certiorari should be granted so that the Court can clarify what constitutes sufficient evidence that a defendant "knowingly has the power and intent to control" for finding constructive possession of a firearm under 21 U.S.C. 922(G), and thereby correct a violation of Petitioner's constitutional right to due process under the Fifth Amendment.

Under the Fifth Amendment, procedural due process is required before the government can take a person's liberty. One of the procedural safeguards against arbitrary deprivation of liberty is the requirement that each and every element of a crime be proven beyond a reasonable doubt. As the Supreme Court held in *Rose v.*

Clark, 478 U.S. 570 (1986), proof beyond a reasonable doubt of each and every element of a crime is a constitutionally mandated requirement.

At the close of the evidence at trial, Defendant's counsel made a Motion for Acquittal pursuant to Fed. R. Crim. P. 29, which was denied. The applicable standard of review for a motion for acquittal requires the court to view the evidence in the light most favorable to the government. *See Glasser v. United States*, 315 U.S. 60, 62 S. Ct. 457, 86 L. Ed. 680 (1942); *United States v. Gibson*, 675 F.2d 825, 829 (6th Cir.), *cert. denied*, 459 U.S. 972, 103 S. Ct. 305, 74 L. Ed. 2d 285 (1982). Under this standard, the court will determine whether the government proved each and every element of the crime beyond a reasonable doubt. *See United States v. Barrera*, 547 F.2d 1250, 1255 (5th Cir. 1977). If a reasonable jury would doubt whether the evidence proves an essential element, the court will reverse. *Id. See also United States v. Onick*, 889 F.2d 1425 at 1428 (5th Cir. 1989).

In view of the current anti-drug campaign in the United States and the heightened emotions involved, this is an appropriate time to stop and closely examine adherence to and compliance with the procedural safeguards guaranteed by the Constitution for all individuals.

At trial, no evidence of actual possession was submitted, and the government did not even attempt to argue that there was actual possession. Petitioner did not have the gun on his person when he was arrested, and in fact, was busy helping a female customer with her groceries at the time of arrest. Therefore, the only possible theory upon which Petitioner could have been convicted was constructive possession.

Under a constructive possession theory, the government was required to prove that Petitioner knowingly had the power and the intent at a given time to control the firearm. *See United States v. Beverly*, 750 F.2d 34 (6th Cir. 1984), citing *United States v. Virciglio*, 441 F.2d 1295 (5th Cir. 1971) and *United States v. Burch*, 313 F.2d 628 (6th Cir. 1963).

In the present case, evidence produced at trial established that there were three co-owners of the grocery store—Joe Saleh, Tony Saleh, and Robert Damon. The evidence further established that Tony Saleh worked at the store during the week, and that the gun was legally owned by and registered to Tony Saleh. After the Petitioner's arrest, government agents found Tony's gun beneath the cash register counter.

The evidence indicated that Petitioner worked at the store on Fridays, and that at the time of arrest, he was behind the counter engaged in the legitimate business of selling groceries to a female patron. The arresting officer testified that at the time of Petitioner's arrest, Petitioner did nothing to indicate that he intended to control the gun in any way or that he knew of the gun's presence at that time. Petitioner's fingerprints were not found on the gun.

Again, there was no testimony that Petitioner actually possessed the gun that day. Additionally, given that the store was in a rough neighborhood, it was reasonable as well as legal for Tony Saleh to keep a firearm, so long as the gun was legally owned and registered.

There was testimony that on several occasions sometime in the past few years, Joe Saleh had dusted and handled an unidentified gun. However, Petitioner

was not a felon, and thus forbidden to handle a gun, until approximately one and a half years before his arrest on December 4, 1987. Thus, on the several occasions in the past when Joe had allegedly handled an unidentified gun, there is no clear indication that he was a felon at such time. In any event, such testimony does not indicate that Petitioner had controlled or intended to control a gun on the date charged.

No direct evidence shows that Petitioner knew of the presence of the gun, nor was there any evidence of his intent to control it. Thus, the conviction was based entirely upon circumstantial evidence and inferences therefrom.

The Sixth Circuit established its test for sufficiency of circumstantial evidence in *United States v. Leon*, 534 F.2d 667 (6th Cir. 1976) in which the court states:

> Where the evidence as to an element of a crime is equally consistent with a theory of innocence as with a theory of guilt, that evidence necessarily fails to establish guilt beyond a reasonable doubt.

The facts conclusively proven facts at trial were that the Petitioner was a co-owner with two other people of the grocery store, that one of the co-owners lawfully owned the gun, and that Petitioner was lawfully engaged in conducting his grocery business at the counter in proximity to his brother's gun at the time of his arrest.

"Mere proximity" and "co-residence" are factors which have repeatedly been held to be an insufficient basis upon which to convict for constructive possession. *United States v. Reese*, 775 F.2d 1066 (9th Cir. 1985); *United States v. Wilson*, 620 F. Supp. 104 (D.C. Tenn. 1985); *United States v. Beverly*, 750 F.2d 34 (6th Cir. 1984).

More is required, namely that the government produce sufficient evidence of Petitioner's knowledge and intent to control the gun. Yet the testimony of the government's own witness, the arresting officer, established that at no time did Petitioner evidence any attempt or other conduct indicating intent to exercise control over the gun, or even to indicate that he had knowledge of the presence of the gun.

Therefore, Petitioner respectfully prays to this Court to accept his Petition for Writ of Certiorari in order to examine the sufficiency of evidence required to establish constructive possession under 21 U.S.C. 922(g) and rectify the manifest injustice suffered by Petitioner in this case.

Third Question Presented:

At the close of the government's case, Petitioner made a Motion for Acquittal for Count 18, pursuant to Rule 29(a) of the Federal Rules of Criminal Procedure. The trial court should have granted this motion under the applicable standard of review already discussed. On appeal, Petitioner's First Assignment of Error in the Sixth Circuit specifically addressed this issue and discussed the fact that the government offered no direct evidence which sufficiently connected Petitioner with the attempted sale of drugs on December 4, 1987.

At trial, the government agent had testified that Petitioner said in a phone call on November 19, 1987, that he was concerned about his brother's safety and that his brother would have "security" with him at a meeting scheduled for November 20, 1987. There was no testimony regarding any discussion of narcotics or criminal activity. At the meeting with Petitioner's brother on November 20, 1987, the transaction was abandoned and no deal transpired.

Two weeks later on December 3, 1987, the federal agent arranged with Petitioner's brother for a sale of narcotics. Shortly thereafter, Petitioner's brother and another individual named Joseph Slate, were arrested, and 500 grams of controlled substance were taken from Joseph Slate.

It is important to note that Petitioner's brother had previously told the agent not to come around when Petitioner was there. There was no evidence connecting Petitioner with the December 4, 1987 transaction. Petitioner did not set the meeting, nor was he present. The government attempted to connect the earlier phone discussion regarding the deal on November 20, 1987 which was abandoned, to a transaction conducted by two other persons at later date, without providing any other direct evidence of Petitioner's knowledge or participation. The government agents even testified that there was no direct link to the Petitioner between mid-October and the December 4, 1987 events.

Furthermore, the government witness had also testified that Petitioner's brother often engaged in criminal activity when Petitioner was not present and which Petitioner was not part of. This may certainly indicate that Petitioner was excluded from the transaction in which his brother was involved and from which Petitioner's conviction resulted.

Thus, Appellant contends there is error in the failure of the trial court to recognize the abandonment of the scheme on November 20, 1987, and error in the failure of the trial court to recognize that no aiding and abetting of a later transaction on December 4, 1987 by Petitioner.

The Sixth Circuit has repeatedly held that mere presence and knowledge of an event do not establish knowing participation. *United States v. Williams*, 503 F.2d 50 (6th Cir. 1974). The traditional view on aiding and abetting requires that "the defendant in some sort

of manner associate himself with the venture, that he participate in it as something that he wishes to bring about, that he seek by his action to make it succeed". *NYE & Nissan v. United States*, 336 U.S. 613, 69 S. Ct. 766 (1949). Under the test proposed in *NYE*, Appellant herein was not an aider and abettor and did not attempt to sell drugs on December 4, 1987 because: (1) there was no action; (2) there was no evidence that he knew of the arrangements for December 4, 1987; and (3) he did not participate and thus did not attempt.

Regarding the November events, the evidence shows the agents calling twice to leave messages for Petitioner's brother. It is submitted that such messages are self-serving to the prosecutor and do not show or reflect criminal intent by the defendant. Petitioner had answered the telephone at his lawful place of employment. A man who is given a message in this way that does not clearly identify criminal intent should not be subject to criminal prosecution, as this would fail under intent and would amount to entrapment. The Petitioner was not part of the illegal transaction that occurred on December 4, 1987, as the evidence shows it was a separate arrangement between the informant and Petitioner's brother.

The charge of aiding and abetting the December 4, 1987 attempt was also charged in a separate count as part of a conspiracy. However, there must be proof of interlocking conspiracies not just circumstance and inference. *Kotteakos v. United States of America*, 328 U.S. 750 (1946), provides that if a conspirator engages in various conspiracies without the knowledge of the various other conspirators, then each separate conspirator in the various conspiracies is not liable for the acts of those in other conspiracies of whom he has no knowledge.

No evidence shows that Petitioner directly knew of the specific goings on of December 4, 1987 and thus he could not have been a complicitor in those events. Even if it is inferred that Petitioner had some knowledge of the events of December 4, 1987, that knowledge is insufficient to sustain a conviction, because mere knowledge is not itself a crime. *United States of America v. Williams*, 503 F.2d 50 (6th Cir. 1974). The mere existence of a conspiracy of which an individual is a part does not make him an aider and abettor of every act taken by a co-conspirator outside the conspiracy in which the individual is involved. *Kotteakos v. United States*, 328 U.S. 750 (1946).

Even assuming *arguendo* that knowledge had been proven, mere knowledge of an event by Petitioner is not a sufficient basis for conviction. There must be an affirmative act as a part of a scheme which results in a crime, in otherwords proof of participation. *United States v. Morei*, 127 F.2d 827 (6th Cir. 1949). An aider and abettor should have specific intent to do or assist in the contemplated act. *United States v. Jones*, 605 F. Supp. 513 (1984). Pursuant to *Jones*, the prosecutor must prove each and every element of the alleged crime as to an aider and abettor.

Petitioner may arguably have been involved in a conspiracy dealing with an earlier contemplated act, but the November 20, 1987 meeting was abandoned and there is no evidence after the abandonment of further involvement by Petitioner. There was, however, testimony by a government witness that the Petitioner's brother engaged in transactions without the Petitioner's involvement.

Thus, Petitioner respectfully requests that this Court accept his Petition for Writ of Certiorari.

CONCLUSION

This Court should grant the Petition for Writ of Certiorari in order to rectify the violations of the Petitioner's right to due process. First, the jury instructions impermissably and seriously confused the jury with regard to the essential elements of possession and proof needed to convict under 18 U.S.C. Section 922(g) "Felon in Possession of a Firearm".

Second, the evidence submitted at trial to prove the charge under 18 U.S.C. Section 922(g) was not legally sufficient for a proper conviction. The trial court should have granted the Defendant's Motion for Acquittal.

And third, the trial court should have granted Petitioner's Motion for Acquittal on Count 18, as raised in Petitioner's appeal, since the evidence does not support a finding that Petitioner aided and abetted on December 4, 1987.

Respectfully submitted,

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(216) 241-0505
Counsel for Petitioner

APPENDIX

DECISION OF THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

(Filed January 17, 1990)

[NOT RECOMMENDED FOR FULL TEXT PUBLICATION]

No. 89-1375

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

ORDER

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

ODEH JOSEPH SALEH,
Defendant-Appellant.

BEFORE: NELSON and BOGGS, *Circuit Judges*; BERTELSMAN, *District Judge**

This cause having come on to be heard upon the record, the briefs and the oral argument of the parties, and upon due consideration thereof,

The court finds that no prejudicial error intervened in the judgment and proceedings in the district court, and it is therefore ORDERED that said judgment be and it hereby is affirmed.

ENTERED BY ORDER OF THE COURT
/s/ LEONARD GREEN, pj
Clerk

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* The Honorable William O. Bertelsman, United States District Judge, Eastern District of Kentucky, sitting by designation.

JUDGMENT OF THE UNITED STATES DISTRICT COURT

(Filed March 15, 1989)

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN

JUDGMENT INCLUDING SENTENCE
UNDER THE SENTENCING REFORM ACT

Case Number 88 80886

Richard Lustig
Defendant's Attorney

UNITED STATES OF AMERICA

V.

ODEH JOSEPH SALEH
(Name of Defendant)

THE DEFENDANT:

[ ] pleaded guilty to count(s) _____.
[x] Was found guilty on count(s) 1, 10, 11, 12, 17 and 20 after a plea of not guilty.

Accordingly, the defendant is adjudged guilty of such count(s), which involve the following offenses:

Title & Section	Nature of Offense	Count Number(s)
21:USC:846	Conspiracy to Possess w/intent to Distribute/Distribute Controlled Substances	1
21:USC:843(b)	Unlawful Use of a Telephone	10
21:USC:843(b)	Unlawful Use of a Telephone	11
21:USC:841(a)(1), 18:USC:2	Distribution of Cocaine, Aiding and Abetting	12
21:USC:843(b)	Unlawful Use of a Telephone	17

The defendant is sentenced as provided in pages 2 through 6 of this Judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

[ ] The defendant has been found not guilty on count(s) _____, and is discharged as to such count(s).

[ ] Count(s) _____ (is)(are) dismissed on the motion of the United States.

[x] The mandatory special assessment is included in the portion of this Judgment that imposes a fine.

[ ] It is ordered that the defendant shall pay to the United States a special assessment of $_____, which shall be due immediately.

It is further ordered that the defendant shall notify the United States Attorney for this district within 30 days of any change of residence or mailing address until all fines, restitution, costs, and special assessments imposed by this Judgment are fully paid.

Defendant's Soc. Sec. Number:
363-62-2975

Defendant's mailing address:
7429 Oakman
Dearborn, Mi. 48126

Defendant's residence address:
7429 Oakman
Dearborn, Mi. 48126

March 6, 1989
Date of imposition of Sentence

/s/ Anna Diggs Taylor
Signature of Judicial Officer

Anna Diggs Taylor, U.S. District Court Judge
Name & Title of Judicial Officer

March 15, 1989
Date

JUDGMENT OF THE UNITED STATES DISTRICT COURT

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN

JUDGMENT INCLUDING SENTENCE
UNDER THE SENTENCING REFORM ACT

Case Number 88 80886

Richard Lustig
Defendant's Attorney

UNITED STATES OF AMERICA

V.

ODEH JOSEPH SALEH
(Name of Defendant)

THE DEFENDANT:

[ ] pleaded guilty to count(s) _____.
[ ] Was found guilty on count(s) _____ after a plea of not guilty.

Accordingly, the defendant is adjudged guilty of such count(s), which involve the following offenses:

Title & Section	Nature of Offense	Count Number(s)
21:USC:841(a)(1)	Possession w/intent to Distribute Cocaine	20

The defendant is sentenced as provided in pages 2 through ____ of this Judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

[ ] The defendant has been found not guilty on count(s) _____, and is discharged as to such count(s).

[ ] Count(s) _____ (is)(are) dismissed on the motion of the United States.

[ ] The mandatory special assessment is included in the portion of this Judgment that imposes a fine.

[ ] It is ordered that the defendant shall pay to the United States a special assessment of $_____, which shall be due immediately.

It is further ordered that the defendant shall notify the United States Attorney for this district within 30 days of any change of residence or mailing address until all fines, restitution, costs, and special assessments imposed by this Judgment are fully paid.

Defendant's Soc. Sec. Number:

_____

Defendant's mailing address:

_____

_____

Defendant's residence address:

_____

_____

_____

Date of imposition of Sentence

/s/ Anna Diggs Taylor
Signature of Judicial Officer

_____

Name & Title of Judicial Officer

_____

Date

Defendant: Odeh Joseph Saleh Judgment—Page _____ of 6
Case Number: 88 80886

IMPRISONMENT

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a term of 97 months on Count 1; 97 months for each Counts 10, 11, 12, 17 and 20, these sentences to run concurrent with each other but consecutive to the defendants state imposed sentence.

[ ] The Court makes the following recommendations to the Bureau of Prisons:

[x] The defendant is remanded to the custody of the United States Marshal.

[ ] The defendant shall surrender to the United States Marshal for this district,

a.m.

[ ] at _____ p.m. on _____.

[ ] as notified by the Marshal.

[ ] The defendant shall surrender for service of sentence at the institution designated by the Bureau of Prisons

[ ] before 2 p.m. on _____.

[ ] as notified by the United States Marshal.

[ ] as notified by the Probation Office.

RETURN

I have executed this Judgment as follows:

_____

_____

_____

_____

Defendant delivered on _____ to _____ at _____, with a certified copy of this Judgment.

_____

United States Marshal

By _____

Deputy Marshal

Judgment—Page _____ of _____

Defendant: Odeh Joseph Saleh
Case Number: 88 80886

SUPERVISED RELEASE

Upon release from imprisonment, the defendant shall be on supervised release for a term of 3 years on Count 1.

While on supervised release, the defendant shall not commit another Federal, state, or local crime and shall comply with the standard conditions that have been adopted by this court (set forth on the following page). If this judgment imposes a restitution obligation, it shall be a condition of supervised release that the defendant pay any such restitution that remains unpaid at the commencement of the term of supervised release. The defendant shall comply with the following additional conditions:

[ ] The defendant shall pay any fines that remain unpaid at the commencement of the term of supervised release.

The defendant's supervised release should be under the additional following conditions:

1. That the defendant not commit any crimes, federal, state or local.
2. That the defendant abide by the standard conditions of supervised release recommended by the Sentencing Commission.
3. That the defendant be prohibited from possessing a firearm or other dangerous weapon.

4. That the defendant is prohibited from incurring new credit charges or opening additional lines of credit without approval of the probation officer.

5. That the defendant is required to provide the probation officer access to any requested financial information.

No. 89-1622

In the Supreme Court of the United States

OCTOBER TERM, 1989

ODEH JOSEPH SALEH, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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Solicitor General
EDWARD S.G. DENNIS, JR.
Assistant Attorney General
VICKI S. MARANI
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Washington, D.C.
(202) 514-2217

QUESTIONS PRESENTED

1. Whether the district court committed plain error in instructing the jury with respect to the principles of constructive possession.

2. Whether the evidence was sufficient to prove that petitioner constructively possessed a firearm.

3. Whether the evidence was sufficient to sustain petitioner's conviction for aiding and abetting an attempt to distribute cocaine.

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In the Supreme Court of the United States

OCTOBER TERM, 1989

No. 89-1622

ODEH JOSEPH SALEH, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The judgment order of the court of appeals (Pet. App. A1) is unpublished, but the decision is noted at 893 F.2d 1335 (Table).

JURISDICTION

The judgment of the court of appeals was entered on January 17, 1990. The petition for a writ of certiorari was filed on April 17, 1990. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

After a jury trial in the United States District Court for the Eastern District of Michigan, petitioner was convicted of conspiring to possess cocaine with the intent to distribute it, and conspiring to distribute cocaine, in violation of 21 U.S.C. 846; aiding and abetting the distribution of cocaine, in violation of 21 U.S.C. 841(a)(l); aiding and abetting an attempt to distribute cocaine, in violation of 21 U.S.C. 846; possessing a controlled substance with the intent to distribute it, in violation of 21 U.S.C. 841(a)(l); possessing a firearm after having been convicted of a felony, in violation of 18 U.S.C. 922(g); and three counts of using a telephone to facilitate a drug felony offense, in violation of 21 U.S.C. 843(b). Petitioner was sentenced to concurrent terms of 97 months' imprisonment on each count, to run consecutively to a state sentence. He was also sentenced to a three-year term of supervised release on the conspiracy count.[1]

The evidence presented at trial showed that from March 1986 until petitioner's arrest on December 4, 1987, petitioner and his brother Tony sold cocaine out of Joe's Neighborhood Market, their family-owned grocery store in Detroit, Michigan.

Joseph Slate, a long-time associate of the Salehs, testified that he had delivered cocaine for the Salehs to about 100 customers and had been compensated with cocaine and groceries from the Salehs' store. Gov't C.A. Br. 8. Another witness, Ted Svereckis, stated that he had bought cocaine from either petitioner or his brother on about 50 occasions. *Id.* at 9. In addition, Gary Raymond testified that he purchased cocaine regularly from both petitioner and Tony Saleh starting in the spring of 1986. *Id.* at 4-5.

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[1] Petitioner was indicted with two co-conspirators, Ahmed Joseph "Tony" Saleh and Joseph Slate, both of whom pleaded guilty. Gov't C.A. Br. 3.

The evidence also showed that the Salehs kept a gun behind the counter of their store. Slate testified that he saw petitioner handle that weapon on more than one occasion. Gov't C.A. Br. 9. In addition, Raymond stated he saw petitioner display a gun at least twice and that petitioner used the gun for emphasis during a conversation. Moreover, Raymond testified that, while holding the gun, petitioner had threatened to kill Raymond's wife. *Id.* at 6.

After that incident, Raymond began cooperating with the Drug Enforcement Administration. Raymond introduced Agent Dominick Braccio to the Salehs, and Braccio then conducted a four-month investigation of the Salehs' cocaine organization. Gov't C.A. Br. 6-7. Braccio bought cocaine from the Salehs on six different occasions. *Id.* at 10.

Although Braccio dealt primarily with petitioner's brother Tony, petitioner was closely linked to Tony's drug transactions with Braccio. On November 6, 1987, Braccio told petitioner over the telephone that he wanted to alter the details of an upcoming cocaine deal that he and Tony had arranged. Petitioner agreed to relay that information to Tony. The cocaine was ultimately delivered on the terms that Braccio had discussed with petitioner. Gov't C.A. Br. 11. Later that month, Braccio called Tony several times in order to set up a large cocaine purchase. Tony was unwilling to commit to a plan until he conferred with his brother. *Ibid.* When Braccio finally contacted Tony at a time when he could consult with petitioner, Braccio asked Tony what the total price of the sale would be if two ounces of cocaine were added to the original order of one pound. Tony conferred with petitioner and then told Braccio that the price would be $18,000. Tony also told Braccio to call petitioner the next day to arrange a time for the sale. When Braccio did so, petitioner set the meeting time and informed Braccio that Tony would bring "security" with him. *Id.* at 12.

The sale was scheduled for November 20, 1987, but it did not occur because Tony did not believe that the proposed location for the transfer was secure and Braccio was unwilling to alter the plans. The sale was rescheduled for December 4, 1987. On that day, Tony Saleh and Slate were arrested as they attempted to deliver 503 grams of cocaine to Braccio. Gov't C.A. Br. 13.

Immediately after those arrests, federal agents executed a search warrant at Joe's Neighborhood Market. Petitioner was the only owner present. When the agents entered, petitioner was standing behind the counter, under which was a loaded .45-caliber pistol. The agents found bullets and $1,500 in cash in petitioner's pockets, including a $50 bill with which the DEA had purchased cocaine from Tony. A quantity of cocaine was recovered from a storage cooler in the store. Gov't C.A. Br. 13. Petitioner was arrested, tried, and convicted, and the court of appeals affirmed without opinion. Pet. App. A1.

ARGUMENT

1. Petitioner raises three challenges (Pet. 5-9) to the district court's instructions on constructive possession. Petitioner's failure to raise any of those challenges in the court of appeals forecloses review by this Court. *United States* v. *Lovasco*, 431 U.S. 783, 788 n.7 (1977); *Adickes* v. *S.H. Kress & Co.*, 398 U.S. 144, 147 n. 2 (1970). In any event, petitioner's claims have no merit.

a. Petitioner first contends (Pet. 6) that the district court should have instructed the jury that in order to establish constructive possession of the firearm found in the Salehs' store at the time of petitioner's arrest, the government must prove that the defendant had knowledge of the presence of the firearm and had the intent to exercise control over it. At trial, however, the district court issued the very instruction petitioner now requests. The court stated that:

> A person who, although not in actual possession, knowingly has both the power and the intention at a given time to exercise dominion or control over the thing, either directly or through another person or persons, is then in constructive possession of it.

8 Tr. 178-179.[2] That instruction required the jury to find that petitioner knew of the presence of the weapon and intended to exercise control over it. Thus, petitioner's claim has no merit.

b. Petitioner also asserts (Pet. 6-7) that the district court should have instructed the jury that petitioner's lack of ownership of the firearm was relevant to the question whether he was in constructive possession of it. The court's failure to give such an instruction, petitioner contends, "effectively precluded" the jury from considering that evidence. But petitioner did not request any such instruction at trial. Moreover, the jury was free to consider that petitioner did not own the firearm, for whatever that evidence was worth. In fact, during closing argument defense counsel brought to the jury's attention that Tony Saleh owned the firearm. 8 Tr. 119-121. The court was not required to instruct the jury that the evidence of nonownership was relevant since a court is not required to instruct the jury as to the probative value of every piece of relevant evidence.[3] Nor was petitioner prejudiced by the court's instruction that peti-

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[2] See 1 E. Devitt & C. Blackmar, *Federal Jury Practice and Instructions* § 16.07 (3d ed. 1977).

[3] The cases cited by petitioner – *United States* v. *McCoy*, 781 F.2d 168 (10th Cir. 1985); *United States* v. *Tribunella*, 749 F.2d 104 (2d Cir. 1984); and *United States* v. *Wilson*, 620 F. Supp. 104 (M.D. Tenn.), aff'd, 774 F.2d 1164 (6th Cir. 1985) (Table) – do not hold otherwise. Those cases stand for the unremarkable proposition that a defendant's ownership or lack of ownership of a firearm is generally relevant to whether he constructively possessed it at a particular time. The cases

tioner's constructive possession of the firearm could be established without proving that petitioner owned the firearm. 8 Tr. 177. Petitioner concedes (Pet. 6) the validity of that instruction.

c. Petitioner also contends (Pet. 8-9) that the district court erred by instructing the jury that the requirements of 18 U.S.C. 922(g) were satisfied by proof that petitioner "possessed the firearm for any length of time." 8 Tr. 176. Although petitioner did not object to that instruction at trial, he now claims that it authorized the jury to return a guilty verdict if petitioner possessed a firearm at times other than the date recorded in the indictment – December 4, 1987. The court, however, made clear to the jury that it could convict petitioner only if it found that "on or about December 4th, 1987, the [petitioner] received or possessed the firearm described in the indictment." 8 Tr. 175. The language referred to by petitioner simply served to inform the jury that the length of time on December 4, 1987, that petitioner may have possessed the firearm was immaterial to his guilt.

2. Petitioner next renews his contention (Pet. 9-13) that the evidence presented at trial was insufficient to prove that he constructively possessed the firearm found near him at the time of his arrest. Viewing the evidence in the light most favorable to the government, however, it is clear that petitioner knew of the presence of the firearm and intended to exercise control over it. Petitioner was a co-owner of the store in which the loaded firearm was found, and he had been seen handling a firearm on several occasions inside the store. Furthermore, when the DEA agents entered the store, the .45-caliber pistol was located just six inches from petitioner's knee. During a search of petitioner incident to

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do not hold or suggest that a defendant charged with constructive possession of a firearm is entitled to an instruction about his lack of ownership of the firearm.

his arrest, the agents found bullets and a marked $50 bill that had been passed to petitioner's brother during a drug sale. Petitioner's ownership of the store, his participation in the drug trade, the testimony that he had handled weapons in the store, his proximity to the firearm, and the presence of bullets in his pocket strongly suggest that petitioner knew of the presence of the weapon and intended, if necessary, to exercise control over it.[4] In light of that evidence, a jury reasonably could have concluded that petitioner, a prior felon, was in constructive possession of the firearm. Thus, the district court properly denied petitioner's motion for a judgment of acquittal on the count charging him with a violation of 18 U.S.C. 922(g).

3. Finally, petitioner renews his claim (Pet. 13-16) that the evidence was insufficient to show that he aided and abetted the attempt to distribute more than 500 grams of cocaine on December 4, 1987.

Contrary to petitioner's claim, the evidence at trial showed that petitioner was an active member of a criminal conspiracy to sell drugs that continued until his arrest on December 4, 1987. Witnesses testified that petitioner characterized himself as the leader of the family cocaine distribution business, boasted of his 14 years of experience as a dealer, weighed and packaged cocaine for sale, and provided cocaine to co-conspirators for delivery. Gov't C.A. Br. 4-6.

The evidence also demonstrated that petitioner was intimately involved in the attempt to sell more than 500 grams of cocaine to Dominick Braccio, an undercover DEA agent, on December 4, 1987. Testimony presented at trial showed

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[4] Petitioner notes (Pet. 11) that he made no attempt to reach for the firearm at the time of his arrest. The arresting agent testified, however, that he put petitioner to the floor as soon as he entered the store in order to prevent petitioner from reaching for a weapon. C.A. App. 121.

that Tony Saleh was unwilling to set up the sale to Braccio without first conferring with petitioner. Once the terms of the sale were settled, Tony again consulted with petitioner to set the sale price at $18,000 for 18 ounces of cocaine. Petitioner made final arrangements with Braccio for the sale to take place on November 20, 1987, and he warned Braccio that Tony would arrive with "security." Although the sale did not go forward on November 20 because of Tony's fear that the proposed site of the sale was not secure, it was rescheduled for December 4, 1987. Clearly, petitioner contributed to the planning and execution of the attempted cocaine sale on December 4. Contrary to petitioner's assertions (Pet. 13, 14, 16), the fact that the sale was postponed from November 20 to December 4 is immaterial. The evidence showed that petitioner's participation in the transaction originally scheduled for November 20 contributed to the attempted sale that ultimately was set for December 4. Thus, the evidence was sufficient to sustain petitioner's convictions for aiding and abetting an attempt to distribute cocaine.[5]

[5] Petitioner suggests, but does not explicitly argue (Pet. 15-16), that his conspiracy conviction may have been based upon insufficient evidence of his involvement in the events of December 4. He states that his participation in the transaction planned for November 20 ended when that deal was abandoned. That claim does not merit review because it was not raised below and it is not raised expressly in the questions presented. In any event, the facts establishing that petitioner aided and abetted the attempted distribution of cocaine on December 4 also demonstrate that petitioner was an active co-conspirator with regard to that crime.

CONCLUSION

The petition for a writ of certiorari should be denied.
Respectfully submitted.

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Assistant Attorney General
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JUNE 1990

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(3)

No. 89-1622

IN THE

Supreme Court of the United States

October Term, 1989

ODEH JOSEPH SALEH,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

PETITIONER'S REPLY BRIEF

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PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
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PETITIONER'S REPLY BRIEF

Numerous statements of fact made by the prosecution in its brief in opposition to the Petition for Certiorari are inaccurate. These misstatements have a direct bearing on the question of what issues would properly be before the Court if certiorari were granted. In Rule 15.1 of the new Rules of the Supreme Court of the United States, this Honorable Court admonishes counsel that they have a duty to bring perceived misstatements in the briefs to the attention of this Honorable Court in a timely manner. Petitioner thus submits his Reply Brief for consideration by this Honorable Court.

Issue 1: Trial Counsel for Petitioner *Did* Object to the Jury Instructions on the Gun Charge.

The prosecutor's brief in opposition states (see Brief in Opposition at p. 4, numbered paragraph 1) that Petitioner's trial counsel did not object to the jury instructions on the gun charge at trial. As shown by the trial transcript pages included in the appendix attached hereto, counsel for Petitioner *did* object to the judge's instruction to the jury regarding the gun charge. Petitioner's trial counsel stated:

> "There is no instruction as to possession. It's like it's—in drug cases, if you don't give an instruction as to possession, it's plain error. I submit to this Court the way that instruction is given, it's isolated, and it would be plain error in view of the fact that there's no specific instruction as to possession on the gun possession." (Transcript Vol. 8, p. 189, lines 19-25).

The transcript thus shows that Petitioner's trial counsel specifically objected to the judge's instruction to the jury, and that the trial judge overruled the objection.

It is Petitioner's position that the jury instructions and/or lack of jury instructions impermissably and seriously confused the jury with regard to the essential elements of possession and proof needed to convict under 18 U.S.C. Section 922(g) "Felon in Possession of a Firearm."

Issue 2: The Prosecution's Brief in Opposition Has Argued Evidence Which Was Not Admitted at Trial and Which Raises Improper Inferences.

The prosecution's brief in opposition states that bullets were found in the Petitioner's pocket at the time of his arrest (See Brief in Opp., p. 7). However, the trial transcript reveals that no such bullets were introduced at trial as evidence. These alleged items would most certainly have been introduced into evidence if they had actually been found. The prosecution must not be allowed to manufacture "evidence" at the appellate level. The trial transcript shows that the only bullets admitted into evidence on this charge were the bullets found inside Petitioner's brother's pistol.

A brief summary of the facts actually before the trial court shows that (1) the gun at issue was owned by and legally registered to Petitioner's brother, (2) Petitioner's brother kept the gun at his place of employment, a store which was co-owned by Petitioner's brother, Petitioner, and a third person, (3) Petitioner did not actually possess the gun, did not indicate any intent to possess the gun, and made no attempt to possess the gun on the date charged, and (4) no fingerprints of Petitioner were found on the gun.

Thus, the prosecution's statement that bullets were found in the Petitioner's pocket is an attempt to create damaging multiple inferences, *i.e.*, if Petitioner possessed bullets, then the bullets must have been for his brother's gun, and that Petitioner therefore must have intended to exert control over the gun. However, since the trial transcript shows that no bullets allegedly found on Petitioner were admitted into evidence, these inferences are not proper. Moreover, the bullets referred to in the prosecution's brief are not identified in any way.

Petitioner has been convicted of "constructively" possessing his brother's legally registered gun. This gun was found at the business where Petitioner's brother worked full-time and where Petitioner worked on Fridays. A DEA agent testified that the Petitioner was busy helping a female patron with her groceries at the time of his arrest, and that this sale was a legitimate one for groceries (See Tr., Jan. 10, 1989, Vol. 6, p. 25, lines 3-20).

Thus, Petitioner has been convicted on the basis of his presence in the store where he was lawfully employed. There is no proof of intent by Petitioner to possess the gun on the date charged. There is merely an inference which is based on Petitioner's presence in the store. "Mere" presence, however, is an insufficient basis upon which to convict for constructive possession of a gun. *United States v. Beverly*, 750 F.2d 34 (6th Cir. 1984); *United States v. Reese*, 775 F.2d 1066 (9th Cir. 1985).

The implications of upholding Petitioner's conviction for the gun charge must be carefully considered. If the requisite "intent" for gun possession can be inferred from mere presence and/or proximity, this essentially means that an individual could be forbidden from entering his place of employment or home if a co-owner decides to keep a gun on the premises. Implicit in the analysis of inferred intent for constructive possession is the further question of whether Petitioner has the right to force another co-owner to remove a lawful gun from the store premises. This would require Petitioner to control the lawful actions of another person.

An additional source of confusion regarding the gun charge is the fact that, as a "conspiracy" trial, this trial included extensive evidence that the Petitioner's *brother*

had been previously arrested while possessing another gun. This other gun was admitted into evidence although it was unrelated to the charge against Petitioner. The evidence of Petitioner's brother's gun possession and improper inferences therefrom undoubtedly influenced the finding of guilty regarding Petitioner.

For the foregoing reasons as well as the reasons contained in the Petition for Certiorari, it is Petitioner's respectful position that the prosecution's evidence against the Petitioner for the charge under 18 U.S.C. Section 922(g) is legally insufficient for a proper conviction, and that this Honorable Court should disregard the prosecution's statement regarding bullets, as no such bullets were actually submitted as evidence at trial.

Issue 3: Whether the Evidence Actually Shows That Petitioner Was "Intimately Involved" with Aiding and Abetting an Attempt to Distribute Cocaine.

The prosecution's brief in opposition states that Petitioner was "intimately involved" in the December 4, 1987 attempted drug transaction which is the basis for the charge of aiding and abetting against Petitioner. However, there is no direct evidence linking Petitioner with this transaction. The issue before the Court is whether the evidence is sufficient to uphold the conviction on this particular charge.

For its evidence of "intimate involvement," the prosecution relied exclusively on several phone calls which relate to an earlier transaction which was abandoned. Specifically, on November 19, 1987, DEA Agent Braccio called Petitioner's brother "Tony" and tried to set up a deal to buy narcotics. The agent did not speak with Petitioner. The next morning Agent Braccio called the store when Petitioner was working. Petitioner answered the phone and cautioned Agent Braccio that Petitioner's brother had "security," *i.e.*, carried a gun. No narcotics or other criminal activity were discussed with Petitioner.

On the same day (November 20, 1987), the proposed transaction with Petitioner's brother "Tony" was abandoned, and no deal transpired. DEA Agent Braccio himself testified that "we told him [Tony] either the deal was going to go at that location or it wasn't going to go at all, and then Tony refused to do the deal . . ." (Tr. January 5, 1989, p. 24, lines 15-17). Agent Braccio states that "the deal did not go through" (Tr. January 5, 1989, p. 24, lines 18-19).

When Agent Braccio tried to buy narcotics from Tony two weeks later, he contacted *only* "Tony," Petitioner's brother. There was no contact whatsoever with Petitioner. Tony made no references to Petitioner and there is no evidence that he consulted with Petitioner about this sale for any reason.

In fact, there is no evidence that Petitioner participated in or even knew about the December 4, 1987 transaction which was negotiated and entirely conducted by his brother and another unrelated person, Joseph Slate. Even if one could infer knowledge from an earlier phone call, knowledge alone is an insufficient basis upon which to convict a man for aiding and abetting. Petitioner must have been a participant, rather than a spectator. See *United States v. Morei*, 127 F.2d 827 (6th Cir., 1949); *United States v. Forl*, 518 F.2d 1134, 1137 (6th Cir. 1975); *United States v. Gallo*, 763 F.2d 1504, 1521 (6th Cir. 1985).

Furthermore, Gary Raymond, the prosecution's own witness and an admitted drug addict, testified that Petitioner's brother conducted deals without Petitioner's knowledge or participation (See Tr. Jan. 4, 1989, p. 74, lines 1-11). Case Agent Braccio also testified that Petitioner's brother had warned him to stay away from Petitioner (See Tr. Vol. 4, Jan. 6, 1989, p. 28, lines 10-12, and p. 30, lines 18-22). This testimony, coupled with the lack of direct evidence against Petitioner, certainly raises reasonable doubt as to whether Petitioner even knew about the deal which Petitioner's brother attempted on December 4, 1987.

Furthermore, this evidence must realistically be reviewed against the known fact that Petitioner's brother had a drug problem (Tr. Jan. 11, 1989, p. 97, lines 19-22).

Petitioner's brother apparently sold drugs to finance his habit. Petitioner cannot be responsible for each and every independent act of this brother.

Petitioner asserts that the evidence did not prove the prosecution's allegations beyond a reasonable doubt. When one considers that thirty years of a man's life are at stake, a careful review of the evidence is certainly warranted, especially given the lack of direct and circumstantial evidence on this particular charge.

The trial court should have granted Petitioner's Motion for Acquittal on Count 18, as raised in Petitioner's appeal, since the evidence is insufficient to support a finding that Petitioner aided and abetted an attempt to distribute narcotics on December 4, 1987, pursuant to 21 U.S.C. §841(a)(1), 21 U.S.C. §846, and 18 U.S.C. §2.

CONCLUSION

Numerous statements made by the prosecution in its brief in opposition are inaccurate and directly affect determinative issues in this appeal. First, the trial transcript shows that counsel for Petitioner *did* object to the judge's instructions to the jury regarding the charge of gun possession. See Appendix for transcript pages.

Second, the prosecution's brief in opposition argues that bullets were found in the Petitioner's pocket at the time of his arrest. However, no such bullets were introduced at trial as evidence.

Third, the prosecution's brief in opposition argues that Petitioner was "intimately involved" in a particular transaction, when there is actually no direct evidence of any participation by Petitioner. For the foregoing reasons and for the reasons set forth in the Petition for Certiorari, Petitioner respectfully requests this Honorable Court to grant his Petition for Writ of Certiorari.

Respectfully submitted,

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Counsel for Petitioner

APPENDIX

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

CRIMINAL ACTION NO.
87 CV 80886

UNITED STATES OF AMERICA,
Plaintiff,

v.

ODEH JOSEPH SALEH,
Defendant.

JURY TRIAL – VOLUME 8

PROCEEDINGS HAD in the above-entitled matter before the Honorable *ANNA DIGGS TAYLOR*, United States District Judge of the Eastern District of Michigan, Southern Division, at 737 U.S. Courthouse and Federal Building, 231 Lafayette Boulevard West, Detroit, Michigan, on Thursday, January 12, 1989.

APPEARANCES:

DONALD A. SCHEER, ESQ., Assistant U.S. Attorney,
On behalf of Plaintiff.

RICHARD M. LUSTIG, ESQ.,
On behalf of Defendant.

* * *

[188] indictment at the back back of all your instructions?

LAW CLERK: Yes, I have it here.

THE COURT: Okay. And the form.

Any objections, counsel, to—

MR. LUSTIG: Yes, Your Honor. Only one: 57—page 57.

THE COURT: Yes.

MR. LUSTIG: Your Honor, you gave the joint possession instruction as to drugs only. I don't think the instruction as given in 57 is fair. It's isolated in the way it's pled.

You gave the instruction regarding joint possession—

THE COURT: Wait a moment. You mean about ownership?

MR. LUSTIG: Yes, Your Honor.

THE COURT: Go ahead.

MR. LUSTIG: I would ask the Court to add to that charge the following language: "However, you must find that the prosecution met its burden of proof, that is, proof beyond a reasonable doubt, that the defendant knew about the presence of the gun and, further, that he intended to exercise control over the gun."

I believe that the language as it sits in the charge now is isolated in view of the fact that the— [189] nothing else concerning the elements of that should be given other than the interstate aspect of it concerning that offense.

Other than that, I believe the jury charge is fair.

MR. SCHEER: I disagree with counsel. I believe that the instruction on page 57 pertains to ownerhip and its significance in this case.

Ownership is not a defense, nor is ownership relevant to consideration of the defense, and any language relating to possession, be it joint or sole or constructive or actual, has no place in that particular instruction.

There are 2 possession instructions in the case. One of them is at page 60, following closely after the instruction that is objected to. I think that the possession instruction at page 60 is a correct statement of the law and that the jury is properly instructed as to that element.

MR. LUSTIG: There is no instriction as to possession. It's like it's—in drug cases, if you don't give an instruction as to possession, it's plain error. I submit to the Court the way that instruction is given, it's isolated, and it would be plain error in view of the fact that there's no specific instruction as to possession on the gun possession.